UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2014 MSPB 18

Docket No. CH-1221-13-0007-W-1

Debra A. Heimberger,

Appellant,

v.

Department of Commerce,

Agency.

March 19, 2014

Debra A. Heimberger, Columbus, Ohio, pro se.

Jonathan Andrew Gowen, Esquire, Suitland, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed her individual right of action (IRA) appeal as filed outside the statutory filing period. For the reasons set forth below, we DENY the petition for review and AFFIRM the initial decision as MODIFIED.

BACKGROUND

¶2 The appellant began working for the agency under a term appointment in April 2010, and was terminated from employment approximately 3 months later. Initial Appeal File (IAF), Tab 13 at 11-12. The appellant filed a complaint with

the Office of Special Counsel (OSC) alleging whistleblower reprisal under 5 U.S.C. § 2302(b)(8), and, on March 18, 2011, OSC issued a preliminary determination to close its inquiry without corrective action. *Id*. at 14-17. OSC provided the appellant an opportunity to respond to its preliminary determination in writing, and, after receiving no response, it issued the appellant a close-out letter on April 7, 2011. *Id*. at 19. The close-out letter informed the appellant of her right to file an IRA appeal with the Board and the time limit for doing so, and it also stated that she may request reconsideration from OSC. *Id*.

¶3 More than a year after OSC issued its close-out letter, on July 9, 2012, the appellant filed a request to reopen with OSC on the ground that she possessed new evidence. IAF, Tab 12, Subtab 8. On August 2, 2012, OSC denied the request to open. IAF, Tab 12, Subtab 9. On October 1, 2012, the appellant filed the instant IRA appeal. IAF, Tab 1.

¶4 The administrative judge issued a timeliness order, and, in response, the appellant argued that the timeliness of her IRA appeal should be judged from the date OSC issued its decision on her request to reopen rather than from the date of its initial close-out letter. IAF, Tab 12 at 3-4. The administrative judge issued an initial decision dismissing the appeal on the basis that the appellant filed it outside the statutory time limit without a showing that the filing deadline should be equitably tolled, and therefore "she failed to make a non-frivolous allegation that the Board has jurisdiction over her appeal." IAF, Tab 25, Initial Decision (ID) at 1, 3-5.

¶5 The appellant has filed a petition for review, arguing that her appeal was timely under the statute and, alternatively, that the deadline should be equitably tolled. Petition for Review (PFR) File, Tab 1 at 4-5. The agency has filed a response to the petition, PFR File, Tab 3, and the appellant has filed a reply to the agency's response, PFR File, Tab 4.

ANALYSIS

The appeal was filed outside the statutory time limit.

¶6 Under 5 U.S.C. § 1214(a)(3)(A), an appellant may file an IRA appeal with the Board once OSC closes its investigation into her complaint and no more than 60 days have elapsed since notification of the closure was provided to her. Under the Board's regulations implementing that statutory time limit, an IRA appeal must be filed no later than 65 days after the date that OSC issues its close-out letter, or, if the letter is received more than 5 days after its issuance, within 60 days of the date of receipt. 5 C.F.R. § 1209.5(a)(1).

¶7 The appellant argues that the timeliness of her IRA appeal should be calculated from the date of OSC's denial of her request to reopen, and not from the date of the April 7, 2011 close-out letter. PFR File, Tab 1 at 4. We disagree. First, we find that the April 7, 2011 close-out letter constituted notice under 5 U.S.C. § 1214(a)(3)(A)(i) and 5 C.F.R. § 1209.5(a)(1) that OSC was terminating its investigation. IAF, Tab 12, Subtab 4. Therefore, this letter satisfied the criteria for triggering the statutory filing period. *See* 5 U.S.C. § 1214(a)(3)(A)(ii). Although the close-out letter invited the appellant to seek reconsideration from OSC, we cannot agree with the appellant that this invitation somehow made the letter provisional or preliminary in nature. PFR File, Tab 1 at 4-5; IAF, Tab 12, Subtab 4. The most reasonable reading of this letter is that OSC made a final decision to terminate its investigation, and any request for reconsideration would be a request for reconsideration of that final decision. IAF, Tab 12, Subtab 4.

¶8 We also disagree with the appellant that OSC's denial of her reconsideration request created a new IRA filing period. PFR File, Tab 1 at 4; IAF, Tab 12, Subtab 9. The Board has found that the denial of a request for reconsideration will generally not restart the statutory period to file an IRA appeal with the Board. *See, e.g.*, *Morrison v. Department of the Army*, 77 M.S.P.R. 655, 660-61 (1998). In *Morrison*, the Board found that the appellant

timely filed her IRA appeal 120 days after OSC granted her request for reconsideration, but otherwise took no further action on her complaint. *Morrison*, 77 M.S.P.R. at 660-61; *see* 5 U.S.C. § 1214(a)(3)(B). The Board reasoned that, OSC, "the very agency . . . whose actions by law determine [an appellant's] right to file an IRA appeal," affirmatively informed the appellant that it was reopening her complaint of whistleblower reprisal. *Morrison*, 77 M.S.P.R. at 659. In contrast to *Morrison*, OSC in this case never informed the appellant it was granting her reconsideration request, reopening the investigation, or otherwise reconsidering its original close-out determination. The Board in *Morrison*, moreover, expressly noted that "the appellant's request for reopening alone, no matter how quickly submitted, would not have affected her filing deadline. Thus, she would have acted at her peril if she had ignored OSC's original notice and it had not timely reopened her complaint." *Id*. at 659 n.4. We therefore agree with the administrative judge that the timeliness of the appellant's IRA appeal should not be calculated from the date of OSC's denial of the request for reconsideration, but rather should be assessed from the date of the close-out letter.[1] ID at 3-4. This IRA appeal was therefore untimely by nearly 16 months.

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[1] We have considered whether the appellant's reconsideration request should be construed as a new whistleblower complaint. However, we find that the reconsideration request pertains to the same disclosures and the same personnel action at issue in the original complaint, merely providing additional details in support of it. IAF, Tab 12, Subtabs 3, 8; *cf. Fisher v. Department of Defense*, 52 M.S.P.R. 470, 474-75 (1992) (new allegations of whistleblower reprisal triggered a new IRA filing period as to only those new allegations). We have also considered the appellant's argument that the instant appeal is timely under *McCabe v. Department of the Air Force*, 62 M.S.P.R. 641, 645 (1994), *aff'd*, 62 F.3d 1433 (Fed. Cir. 1995) (Table), in which the Board found that the filing period began to run from the date that OSC denied the request for reconsideration. PFR File, Tab 1 at 5. However, the critical fact in *McCabe* was that OSC did not construe the appellant's allegations as pertaining to whistleblower reprisal when it issued its original close-out letter, so its reconsideration denial was effectively a new determination. 62 M.S.P.R. at 645. Those circumstances are not present here.

There is no basis to toll the filing deadline.

¶9 Notwithstanding the implementing provisions of 5 C.F.R. § 1209.5(a), the filing period for an IRA appeal is statutory—not regulatory. 5 U.S.C. § 1214(a)(3)(A); *see Wood v. Department of the Air Force*, 54 M.S.P.R. 587, 591 & n.7 (1992). Unlike the Board's regulatory time limits for appeals filed under 5 U.S.C. § 7701, the statutory time limit for filing an IRA appeal cannot be waived for good cause shown because there is no statutory mechanism for doing so. *Pacilli v. Department of Veterans Affairs*, 113 M.S.P.R. 526, ¶ 10 (2010), *aff'd sub nom. Pacilli v. Merit Systems Protection Board*, 404 F. App'x 466 (Fed. Cir. 2010); *Wood*, 54 M.S.P.R. at 592; *cf.* 5 C.F.R. § 1201.22(c).

¶10 However, the filing deadline might be subject to equitable tolling, under which the filing period is suspended for equitable reasons, such as when the complainant has been induced or tricked by her adversary's misconduct into allowing the deadline to pass.[2] *Wood*, 54 M.S.P.R. at 592; *see Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990); *Kirkendall v. Department of the Army*, 479 F.3d 830, 839 (Fed. Cir. 2007) (en banc). Equitable tolling is a rare remedy that is to be applied in unusual circumstances and generally requires a showing that the litigant has been pursuing her rights diligently and some extraordinary circumstances stood in her way. *Wallace v. Kato*, 549 U.S. 384, 396 (2007); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). For the following reasons, we find no basis to apply the doctrine in this case.

¶11 First, we have considered the appellant's argument that her untimely filing should be excused because it was based on previously unavailable evidence. PFR File, Tab 1 at 4-5. The discovery of previously unavailable evidence may

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[2] Although the Board has discussed the matter several times, it never has actually decided whether the filing period in 5 U.S.C. § 1214(a)(3)(A) is in fact subject to equitable tolling. We likewise find no basis to resolve the issue in the context of this appeal because the appellant has not alleged facts that would bring her situation within that doctrine. *See Raiszadeh v. Department of Veterans Affairs*, 86 M.S.P.R. 94, ¶ 6 (2000).

constitute good cause to waive the Board's regulatory filing deadlines. *See Owen v. U.S. Postal Service*, 87 M.S.P.R. 449, ¶ 6 (2000). However, we find that the discovery of new evidence does not generally constitute the type of extraordinary circumstance that warrants tolling a statutory deadline, especially where, as here, there is no indication that the evidence was previously unavailable because the agency improperly concealed it.

¶12 Second, we have considered the language in OSC's April 7, 2011 close-out letter. IAF, Tab 12, Subtab 4. The language that OSC used is not a model of clarity. The letter at once notified the appellant of her Board appeal rights and the time limit for pursuing them, and invited her to seek reconsideration directly from OSC. Thus, the close-out letter appears to have given the appellant two options for further action, but it did not inform her of the consequences of electing one versus the other. *Id*. We can see how a reasonable person might have been affirmatively mislead by this language into seeking reconsideration from OSC while her time period for filing with the Board, unbeknownst to her, continued to run. These circumstances would constitute a least an arguable basis for equitable tolling. But we find that that is not what happened here. Rather than diligently pursuing her rights as instructed by OSC, the appellant apparently resigned herself to the close-out decision for over a year until she decided to start pursuing the matter again because of events that developed in a different forum. IAF, Tab 12, Subtab 8. Because the appellant did not diligently pursue her whistleblower claim during the period to be tolled, and because it does not appear that the potentially misleading language in OSC's close-out letter was causally related to the appellant's untimely filing, we find that she has not shown that she pursued her rights diligently but was frustrated by extraordinary circumstances. *See Novartis AG v. Lee*, 740 F.3d 593, 600 (Fed. Cir. 2014). For these reasons, we find that the appellant has not shown a sufficient basis to toll the filing deadline and that the appeal must be dismissed as untimely filed.

The Board does not reach the jurisdictional issue.

¶13 Although we generally agree with the administrative judge's analysis of this case, we wish to clarify the legal basis for the dismissal. The initial decision states that the appeal is dismissed for lack of jurisdiction. ID at 1, 5. It is not. The correct disposition for this case is dismissal as untimely filed. *See, e.g.*, *Inman v. Department of Veterans Affairs*, 115 M.S.P.R. 41, ¶¶ 16-17 (2010); *Bauer v. Department of the Army*, 88 M.S.P.R. 352, ¶ 5 (2001). As the court explained in *Kirkendall*, 479 F.3d at 842, time prescriptions are not jurisdictional. Because the appeal is dismissed on timeliness grounds, we do not reach the jurisdictional issue. *See Popham v. United States Postal Service*, 50 M.S.P.R. 193, 196-97 (1991).

ORDER

¶14 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit.

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you want to request review of the Board's decision concerning your claims of prohibited personnel practices under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge

the Board's disposition of any other claims of prohibited personnel practices, you may request the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction to review this final decision. The court of appeals must receive your petition for review within 60 days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal Circuit or any other court of appeals of competent jurisdiction, but not both. Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information about the United States Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11. Additional information about other courts of appeals can be found at their

respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.